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Of Presidents, High Representatives and European Commissioners – the external representation of the European Union seven years after Lisbon

*Frank Hoffmeister**

The article reviews the external representation of the European Union. Hoffmeister first analyses the rules established by the Lisbon Treaty (2007). He emphasizes the division between the Common Foreign and Security Policy (CFSP) and non-CFSP and the importance of the diplomatic level. Moreover, he interprets recent case law in which the European Court of Justice has given guidance to the Council and the Commission about their respective roles in policy-making and representation. The author then provides extensive case studies on Iran, Ukraine, trade negotiations and environmental negotiations to track down relevant practice of the last seven years. He concludes that Europe continues to operate a multi-layered system of external representation, where supra-national elements with a strong role of the Commission in important areas are combined with inter-governmental traits of a principal–agent relationship between the Council and its President or the High Representative.

* Dr Iur, Professor at the Free University, Brussels. Email: frank.hoffmeister@ec.europa.eu. For the case studies on Iran and the Ukraine in section 4, I would like to warmly thank Mrs Charlotte Berends for extensive research and analysis. Important details from the practice of the EU's environmental diplomacy I owe to the Academic Director of the Institute for European Studies (Brussels), Prof Sebastian Oberthür. The article also benefited from a couple of interviews held with the former Trade Commissioner Karel De Gucht and high EEAS officials on matters touched upon in this article.

1. Introduction

When dealing with the external representation of the European Union at the beginning of the last decade, the drafters of the (failed) constitution faced many challenges.¹ There had been a widespread perception that too many actors could speak for the EU, including the rotating presidency of the Council of Ministers. As the latter changes every half-year between different Member States with diverging priorities, this was deemed detrimental to the coherence of the EU's external policies. Moreover, even when looking at the EU institutions which could provide some continuity, there was another problem. Before Lisbon, the EU had nominated a High Representative for the Common Foreign and Security Policy (CFSP) while maintaining at the same time a European Commissioner for External Relations in the College of Commissioners. These two offices (held respectively by Javier Solana and Chris Patten, later Benita Ferrero-Waldner) were often stepping on each other's feet, thereby creating internal friction and external incoherence.²

In order to tackle these challenges, the Working Group VII of the European Convention recommended some fundamental reforms.³ First, it propagated the institutional novelty of a 'double-hatting'. The same person who is nominated as High Representative (HR) for the CFSP should also become Vice-President of the Commission, being in charge of external relations in the College.⁴ This was sought to be a radical solution for the turf battle between the *Berlaymont* (seat of the Commission) and the *Justus Lipsius* (seat of the Council and the HR) buildings: it kept the powers of the two institutions alive but concentrated the execution of their decisions into the hands of one person. Second, that person should also ensure the external representation of the Union to 'improve the visibility, clarity and continuity of EU external representation vis-à-vis third countries'.⁵ Between the lines, this move was designed to strip the rotating presidency of the Council of its powers in external representation. The so-called CFSP 'troikas' with representatives from a Member

1 For an overview of the draft constitution with respect to external relations see M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 CML Rev 1347.

2 For an overview of the pre-Lisbon situation, see B Martenczuk, 'The External Representation of the European Union: From Fragmentation to a Single European Voice?' in A Fischer-Lescano, H-P Gasser, T Marauhn and N Ronzitti (eds), *Frieden in Freiheit: Festschrift für Michael Bothe zum 70. Geburtstag* (Nomos 2008) 941.

3 European Convention, Final Report of Working Group VII on External Action, CONV 459/02 of 16 December 2002.

4 *ibid*, Recommendation No 5, 5.

5 *ibid*, Recommendation No 13, last bullet, 10.

State holding the presidency, the HR and the Commission should thus become a matter of the past.⁶ This, so the drafters sought, would make the High Representative the main external representative of the European Union – a European foreign minister.

Although the project of a European constitution failed due to negative referenda in France and the Netherlands, most of these reform proposals were later incorporated in the Treaty of Lisbon (2009). A more cosmetic, but nevertheless telling change, upon which the Member States (represented by the Foreign Ministers) insisted, was to downgrade the title of the new EU Foreign Policy Chief: he became the ‘High Representative of the Union for Foreign Affairs and Security Policy’. This description lacked any ‘ministerial’ credence, aiming to dispel fears related to terms that could evoke the image of a ‘state’⁷ (and is far too long for any full newspaper quote). But apart from such symbolic moves, he kept his upgraded powers on substance as the lead figure on foreign policy, including presiding permanently over the Foreign Affairs Council and acting as the Commission Vice-President on external relations. Seven years after the Treaty’s entry into force, a couple of questions can be asked about the actual implementation of this design: How has the external representation of the EU evolved? Does Europe now have a single voice and did the turf battles between institutions come to an end? In order to respond to these questions, the present contribution will first recall in some detail the current legal foundation of the EU’s external representation. We will then review some selected practice in the field of CFSP and non-CFSP before concluding.

2. The Lisbon rules on external representation

2.1 The division between CFSP and non-CFSP

The Treaty’s first guiding principle to organize the external relations of the European Union can be found in the Treaty on European Union (TEU). As an overall ‘federalization’ of European foreign policy had been a political non-option for a couple of Member States, the treaty

6 *ibid*, Recommendation No 5, last bullet, 5.

7 C Kaddous, ‘Role and Position of the High Representative of the Union for Foreign Affairs and Security Policy under the Lisbon Treaty’, in S Griller and J Ziller (eds), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 205, 206.

kept the fundamental duality between CFSP and non-CFSP provisions alive.⁸ In particular, the Lisbon Treaty did not result in a ‘communitarization’ of the CFSP.⁹

While enacting a couple of general provisions on the Union’s external action in the first chapter of Title V (Articles 21–22 TEU), the entire second chapter is thus dedicated to ‘common foreign and security policy’ (CFSP). That policy is ‘subject to specific rules and procedures’ (Article 24(2), 1st sentence TEU). In short, CFSP decision-making is in the hands of the European Council and the Council (Article 26(2) TEU), while the High Representative of the Union for Foreign Affairs and Security Policy (HR) ensures the implementation thereof (Article 27(1) TEU). Importantly, under Article 27(2) TEU, the HR ‘shall represent the Union for matters relating to the common foreign and security policy. He shall conduct political dialogue with third parties on the Union’s behalf and shall express the Union’s position in international organisations and at international conferences’. A newly created European External Action Service is put at his disposal to carry out these functions (Article 27(3) TEU). A certain lacunae, though, exists for the question of a political deputy. Should it be the highest-ranking European External Action Service (EEAS) official, or can the HR also appoint ad-hoc Foreign Ministers of a Member State or Commissioners to represent her at a political level? While the Treaty is silent on the issue, the early practice of Mrs Ashton pointed to the latter direction.¹⁰ This choice may also have been inspired by the fact that only ministers can preside over a Foreign Affairs Council, but no EEAS official.

En revanche, the Treaty on the Functioning of the European Union (TFEU) contains a number of chapters dedicated to specific policy fields. These relate to the common commercial policy (Articles 206–207 TFEU), development cooperation (Articles 208–211 TFEU), economic, financial and technical cooperation with third countries (Articles 212–213 TFEU) and humanitarian aid (Article 214 TFEU). In addition, each internal policy of the European Union has an external dimension under Article 3(2) TFEU and the case law of the Court.¹¹ Accordingly, the Union also pursues external activities in fields such as transport, the protection of

8 J Wouters and T Ramopoulos, ‘Revisiting the Lisbon Treaty’s Constitutional Design of EU External Relations’, in LS Rossi and F Casolari (eds), *The EU after Lisbon* (Springer 2014) 215, 219.

9 Kaddous (n 7) 207.

10 Wouters and Ramopoulos (n 8) 228.

11 For an excellent comprehensive overview of the recent case law on implied competence see F Erlbacher, ‘Recent Case Law on External Competences of the European Union: How Member States Can Embrace Their Own Treaty’, *CLEER Papers* 2017/2, 24.

the environment or migration, just to name a few. In all these non-CFSP areas (or integrated external policies), the European Commission ensures the external representation of the Union. This fundamental division between CFSP and non-CFSP is expressly laid down in Article 17(1) 5th sentence TEU: 'With the exception of the common foreign and security policy, and other cases provided for in the Treaties,¹² it [the Commission] shall ensure the Union's external representation.' Inside the Commission, the function of the Vice-President is reserved to the High Representative (Article 17(5) TEU), but the President can also attribute external relations portfolios to other Commissioners (Article 17(6)(b) TEU). In practice, no fewer than three individuals usually take up the roles of Trade Commissioner, Development Cooperation Commissioner and Commissioner for Neighbourhood and Enlargement. Moreover, not even the title Vice-President is reserved for the High Representative. The Commission President continued to appoint several Vice-Presidents. Currently, Mr Juncker has even given diplomatic precedence to 'First Vice-President' Timmermans over the current High Representative, Mogherini. She is but a simple Vice-President, albeit a constitutionally guaranteed one.

Given that the internal set-up remained quite different between CFSP and non-CFSP, it becomes important to delineate the two areas. However, the Treaty is less clear on this crucial aspect. In the old, pre-Lisbon version of Article 40 TEU, the Treaty 'protected' the integrated policies against an encroachment from inter-governmental CFSP action. Thus, in the famous small arms case, the Court of Justice was able to adjudicate whether the *content* and the *objective* of a measure would fall in the EU's development policy or the CFSP.¹³ With the Treaty of Lisbon, this delineation has become more difficult for two reasons. First, Article 40(1) TEU got complemented by a second paragraph, according to which the implementation of integrated policies should not affect CFSP-action (Article 40(2) TEU). This new 'protection' put CFSP and non-CFSP policies on the same legal level. Hence, the former '*in dubio pro communitate*' rule was abolished. Second, Article 21 TEU contains nowadays general objectives for its entire spectrum of external action. When an objective in the list clearly refers to CFSP (international peace and security) or integrated policies

12 This other area relates to the external representation of the Eurozone under Article 138(2) TFEU, a special topic that will not be dealt with in this article.

13 Case C-91/05, *Commission of the European Communities v Council of the European Union* [2008] ECR I-03651 EU:C:2008:288 with case note by Hillion and Wessels in (2009) 46 CML Rev 551.

(trade, development or humanitarian aid), the aim of the measure could still help in the delimitation exercise.¹⁴ However, the remaining objectives apply to several areas alike. Accordingly, one cannot say that, for example, the pursuance of a human rights objective is characteristic of either a CFSP or a non-CFSP act. It should guide both acts. This, in turn, makes it difficult to deduce from a given act's objective whether or not it falls into the area of CFSP or into an integrated policy.

Against that background, the delimitation must foremost look at the content of an act.¹⁵ Typically, acts that are related to trade or development cooperation will not qualify as falling into the CFSP. But when trying to define what 'foreign' policy may entail, caution is needed. Whereas military measures and those that relate to the external security of the Union will usually fall within the ambit of the CFSP, measures to strengthen international peace and security will depend on their precise form. If they are of an economic, financial or technical support nature, they can be based on the so-called Stability Instrument,¹⁶ an EU regulation that is itself based on Articles 207 and 212 TFEU. Luckily, this distinction remains largely internal, though. It is precisely with respect to this kind of action, where the 'double' hat of the High Representative comes into play. Under his 'Commission hat' he can initiate the programming of such measures¹⁷ and under his 'CFSP hat' he can use the instrument in his external political dialogues with the partner country or region in question.

2.2 The significance of the diplomatic level

An additional complication arises when moving up the diplomatic ladder. While the delimitation between CFSP and non-CFSP remains intact also at presidential level, the 'double-hatting' does not. Rather, inside the Commission the task of representing the EU for non-CFSP matters is vested in the President of the Commission (from 2009–14 Mr Barroso, currently Mr Juncker), whereas the President of the Council (from 2009–14 Mr van Rompuy, currently Mr Tusk) ensures the external representation of the Union on CFSP matters (Article 15(6) TEU) 'without prejudice to the powers of the High Representative'.

14 Wouters and Ramopoulos (n 8) 219.

15 F Hoffmeister, Commentary on Article 212 TFEU, Point 13, in Grabitz and Hilf, EU-Kommentar, 55th Ergänzungslieferung, Beck 2014.

16 Council Regulation (EU) Nr 230/2014, OJ 2014, L77/1.

17 Inside the Commission, a Directorate on Foreign Policy Instruments (FPI) is entrusted to the High Representative/Vice President (HRVP) to that effect.

Not surprisingly, this parallel regime at the highest level led to some rivalries and power struggles.¹⁸ While the delimitation between CFSP and non-CFSP matters may work in certain areas, it does not when it comes to summits in which a couple of cross-cutting issues are discussed. In theory, the two Presidents would both attend the same meeting and agree in advance who speaks on which agenda point. In practice, this is difficult to achieve as EU attendance may be limited and topics may evolve in a given discussion. So, van Rompuy and Barroso struck a deal in March 2010 over how to roughly cope with their external representative tasks.¹⁹

In EU summits with third countries, both Presidents would attend. As political issues are normally higher in priority for such bilateral talks, Mr van Rompuy would speak first on general lines. When the discussion would become more concrete and touch upon the economic relationship between the EU and that country, Mr Barroso (and his Commissioner for Trade, Mr De Gucht) could come in as well at a summit.²⁰ Clearly, this rule of thumb gave Mr van Rompuy the diplomatic precedence on the bilateral international scene.

The two Presidents also turn up together in important international fora. This is the case for both the G20 meetings²¹ and for the G7/G8 meetings.²² Only the preparatory work is divided somehow. For G20 meetings, the Diplomatic Advisor of the Council President (Cabinet) is in the lead, while the preparatory work at this level for the G7/G8 is done by the Commission President's Economic Adviser (sherpa). A particular challenge here is to coordinate with the sherpas of other G7 Member States (Germany, France, UK, Italy), to make sure that European leaders speak roughly in the same direction at least on issues that fall into the EU's exclusive or shared competence.

18 For an early report about some friction between the two Presidents, see Bruno Waterfield, 'The Two Rival Presidents Battling for Power Over the EU' *The Telegraph* (9 June 2011) <http://www.telegraph.co.uk/news/worldnews/europe/eu/8566790/The-two-rival-presidents-battling-for-power-over-the-EU.html>.

19 Practical Arrangement between President Van Rompuy and President Barroso regarding External Representation of the European Union at Presidential Level (16 March 2010), Centre for European Policy Studies, Egmont – The Royal Institute for International Relations and European Policy Centre, Joint Study, *The Treaty of Lisbon: A Second Look at the Institutional Innovations* (2010) <http://www.ceps.eu/book/treaty-lisbon-second-look-institutional-innovations>, Annex I, 78.

20 A more restricted set-up occurred at EU–China summits. Here, only the Presidents were allowed to take the floor on either side.

21 In the last two G20 meetings in Turkey (November 2015) and China (September 2016), both Mr Tusk (Council President) and Mr Juncker (Commission President) represented the EU.

22 In the last two G7 meetings in Germany (June 2015) and Japan (May 2016), both Mr Tusk (Council President) and Mr Juncker (Commission President) represented the EU.

2.3 The tension between policy-making and representation

This latter observation leads us directly to the next point. It is not enough to sort out *who* actually represents the European Union internationally, but also to define *what* is said there.

In this regard, the Treaty is relatively precise in the CFSP area. Under Article 26(2) TEU the Council shall ‘take the decisions necessary for defining and implementing’ the CFSP, whereas the policy is only ‘put into effect’ by the HR (Article 26(3) TEU). This system establishes a clear principal–agent relationship. First, the Council decides on the policy content, and then the HR carries it out. Clearly, there are certain margins of manoeuvre for the HR to determine the details of the policy and for updating it in view of changed circumstances. Moreover, the personality of the High Representative also plays a role – the first holder of the office (pre-Lisbon), Mr Solana, seems to have used the available space more actively than his successor (post-Lisbon), Mrs Ashton. But the starting point is clear: without a Council CFSP decision backing him, the HR cannot represent the EU. That, in turn, may lead to the absence of the EU in the international scene. This vacuum may then either be filled by the Member States bilaterally or remain. In the latter case, the rest of the world will understand that the particular issue is indeed of no European interest at all.

In the non-CFSP field, the dividing line between policy-making and external representation is somehow similar. Under Article 16(1) 2nd sentence TEU, the Council shall carry out ‘policy-making’. According to Article 16(6) 3rd subparagraph TEU, it is again the Council that ‘shall elaborate the Union’s external action’ (on the basis of strategic guidelines from the European Council, which have, however, never been adopted in practice). But the wording is different. The treaty does not require formal ‘decisions’, like in the CFSP field. Rather, it talks about the ‘elaboration’ of the Union’s external action. That means that certain policy guidance can be given to the Commission as external representative. The form thereof is left to the discretion of the institutions: the Council can issue formal Council conclusions, or it can adopt working party papers that are never published. It is also possible to simply discuss a topic between Member States delegates in the presence of the Commission without ever taking a consolidated Council view at all. In all cases, the Commission shall then ‘represent’ the EU within the broad policy parameters set by the Council under Article 16(1) TEU.

3. The scope of representation

While Articles 16 and 17 TEU hence give a general indication on the institutional balance between the two institutions on non-CFSP matters, the precise delimitation has again become subject to intensive debate. Interestingly, a number of those inter-institutional battles also reached the European Court of Justice. It is thus helpful to summarize briefly the state of the art with respect to three typical acts: international treaty negotiations, political memoranda of understandings and submissions before international courts.

3.1 International treaty negotiations

For international agreements, following another recommendation of the Convention's Working Group,²³ the Lisbon Treaty only foresees one set of provisions (Articles 216–218 TFEU) for both CFSP and non-CFSP agreements. This replaced the previous system, where CFSP agreements were dealt with under ex-Article 24 TEU and all other agreements under ex-Article 300 TEC. Under the Lisbon Treaty, the typical course of action is as follows.

First, based on a recommendation by the future chief negotiator, the Council authorizes the opening of negotiations (Article 218(2) TFEU). For agreements that relate exclusively or principally to the CFSP, it will appoint the HR as head of the Union's negotiating team. For non-CFSP agreements, this role will be assumed by the Commission (Article 218(3) TFEU). Second, the chief negotiator will conduct the negotiations in line with the Council's negotiating directives. The Council will also designate a special committee in consultations with which the negotiations must be conducted (Article 218(4) TFEU). The negotiation directives are guidelines that serve to convey to the negotiator the general objectives which the latter must endeavour to achieve in negotiations.²⁴ However, they cannot empower the Special Committee to impose substantive EU positions on the chief negotiator as that would go beyond the consultative functions of the former.²⁵ Rather, the chief negotiator can only be asked to regularly inform the Council about the progress of the negotiations.²⁶ This clarification makes sure that the Council does not

23 European Convention (n 3), Recommendation No 12, 9.

24 Case C-245/13, *European Commission v Council of the European Union*, EU:C:2015:174, Opinion of Advocate General Wathelet of 17 March 2015, para 71.

25 Case C-245/13, *European Commission v Council of the European Union*, EU:C:2015:483, Judgment of the Court of Justice of 17 July 2015, paras 85–97.

26 *ibid* paras 60–84.

over-extend its policy-making prerogative by prescribing every detail to the chief negotiator. In a similar vein, the chief negotiator has the duty to fully and immediately inform the European Parliament about all stages of the negotiations under Article 218(10) TFEU. Importantly, this duty relates to both CFSP and non-CFSP agreements in the same way.²⁷

Finally, once the negotiations are concluded, the Council will take a decision on signature under Article 218(5) TFEU and conclusion (ratification) after having involved the European Parliament under Article 218(6) TFEU. Unfortunately, even the detail about signature is not clear. In the Council's practice, it often empowers the rotating Council presidency to designate 'a person' to sign an EU agreement. In practice, this person is often a Minister or the Ambassador of the presidency itself. However, as the Council presidency has no role in the external representation of the EU anymore, such a self-designation does not make sense. Rather, it should be common sense for the Council to authorize right away the chief negotiator of the treaty (the HR or the Commission) to also sign it.

The above-mentioned system relates to EU agreements with third states. However, in EU practice there are many situations where the substance of an agreement goes beyond EU powers and touches upon Member State competence as well. In those instances, both the EU and its Member States will become party to the agreement – so-called 'mixed agreements'. This *cas de figure* then also has consequences for external representation. Theoretically, each Member State could well represent itself for the relevant 'national' part of the agreement. *In extremis* this would bring the EU negotiating team to 29 persons: the EU chief negotiator and 28 representatives from EU Member States. In practice, this is regularly avoided, though. Representatives of the Member States, united in the Council, will appoint a common negotiator of their choice instead. This representative can be the Commission, the High Representative or even a representative from the rotating Council presidency. It follows that for mixed agreements, the external representation may differ on a case-by-case basis. In the best case scenario, the Member States will opt for the same institution that is already the EU chief negotiator (i.e. the HR for CFSP agreements and the Commission

27 ECJ, Case C-658/11, *European Parliament v Council of the European Union*, EU:C:2014:2015, para 85; ECJ, Case C-263/14, *Parliament v Council*, Judgment of 14 June 2016, para 68. In both cases, the Court upheld Article 37 TEC as the correct legal basis for EU agreements with Mauritius and Tanzania on the transfer of suspected pirates caught by the EU military mission 'Atalanta' near the coast of Somalia, but found that the Council had not informed the Parliament of the progress and the conclusion of the negotiations with the third state in question.

for non-CFSP agreements). That is the predominant practice in bilateral treaty negotiations with third states.²⁸ In other cases, the representation may be divided between the EU chief negotiator and the representative from the rotating Presidency, who will have the duty to agree between themselves how to divide the practical work in a consistent way. This happens more in a multilateral context.

3.2 Political Memoranda of Understanding

Questions of institutional balance are also at stake when it comes to the negotiation and signing of non-binding agreements, so-called Memoranda of Understanding (MoU). As the Treaty does not contain specific provisions in this regard, guidance must come from Articles 16 and 17 TEU. Here, the recent case about the financial contribution of Switzerland to the economic and social cohesion in an enlarged Union is illustrative. Following the respective enlargements of the European Union in 2004 and 2007, Switzerland agreed to pay a lump sum to compensate for the fact that it now had access to a much broader internal market than before. The level of these payments was agreed with the EU through a MoU. In 2006 (for the then 10 new Member States) and in 2008 (for Bulgaria and Romania), such MoUs were signed for the EU by both the President of the Council and the Commission, respectively. After the entry into force of the Lisbon Treaty the Commission insisted to sign the next MoU in 2013 (for Croatia) alone. The Council took issue with this new practice and challenged it before the Court as a breach of the inter-institutional balance under Article 13(2) TEU. Interestingly, though, the Council did not argue that it was empowered to grant co-signature to a representative of the Presidency. Instead, and more cautiously, it argued that the Commission signature should not have occurred without prior authorization of the Council. The Court agreed with this analysis, holding that the Commission's powers of external representation under Article 17(1) TEU do not include the signature of a non-binding MoU.²⁹ Rather, the decision to sign or not requires an assessment of the Union's interest in line with the constitutional requirements under the EU's external objectives in Articles 21(1) and (2) TEU. Such assessment involves policy-making

28 F Hoffmeister, 'Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and Its Member States', in C Hillion and P Koutrakos, *Mixed Agreements Revisited* (Hart 2010) 249, 253–4.

29 Case C-660/13, *Council of the European Union v European Commission*, Judgment of the Court of Justice of 28 July 2016, para 38.

which falls under the Council's prerogatives in Articles 16(1) and (6) TEU.³⁰ Accordingly, the Court annulled the Commission's decision to sign the MoU.

It follows from this judgment that the legal framework for MoUs is largely comparable to the one for binding agreements. The Council should authorize their negotiation and signature, while the Commission should negotiate and actually sign.³¹ The most important difference relates to the Parliament. For binding agreements, the European Parliament must either be consulted or give consent under Article 218(6) TFEU, while there is no parliamentary role for MoUs.

3.3 Submissions before foreign and international courts

Another important type of representation is the conduct of judicial litigation. For cases before the European Court of Justice, the rule is simple. Each institution represents itself and defends its own action and interests. However, these are cases of internal representation before the highest European Court. In neither of those cases may an institution speak for the 'European Union' as a representative of the Union as whole. Rather, this role can only be played in international litigation before foreign or international courts.

Since its inception, the Treaties gave the Commission the role to represent the then Community before national Courts of the Member States (ex-Article 282 TEC). Today, this provision forms part of the Lisbon Treaty as well (Article 335 2nd sentence TFEU). While the wording was restricted to representation in domestic situations, the Commission always argued that it could represent the Community also before foreign courts by analogy. This point of view was accepted by the European Court of Justice (ECJ).³² Accordingly, the Commission submitted *amicus curiae* briefs on matters relating to the internal market or competition law before mostly American courts to defend European interests. Exceptionally, such briefs would also cover international law, touching issues such as universal civil jurisdiction³³ or corporate

30 *ibid* paras 39–40.

31 As noted above (section 2.3), the legal rule for signing binding agreements is that the negotiator alone should sign an EU agreement, although, in practice, the Council still empowers the Presidency to designate a person (which in practice turns out to be a Presidency representative) to sign on behalf of the Union. The current writer believes that this practice is not in line with the Treaty.

32 Case C-131/03 P; *Reynolds Tobacco and Others v Commission*, EU:C:2006:541, Judgment of the Court, para 94.

33 See the brief of the European Commission in the *Sosa v Alvarez Machain* case before the US Supreme Court (2004) 542 US 692, with a discussion in Donald Francis Donovan

responsibility for human rights violations.³⁴ In these international law cases, however, individual Member States would claim the right to submit briefs on the same topic at the same time. This happened in both the *Sosa* (brief of the UK, together with Australia and Switzerland (!)) and the *Kiobel* interventions (individual briefs from the UK, the Netherlands and Germany) before the US Supreme Court. Apparently, these governments thought that those issues of international law fell within the CFSP. Consequently, they intervened in their own name as any EU position in the field would not prejudice their right to act in international fora. For the Commission, though, the aspects were having a direct effect on the business of European companies abroad, falling under its trade and external economic policy.³⁵ In such a scenario an additional intervention of a Member State on a topic already covered by the EU is not admissible. In any case, even if the issue was to be qualified as being predominantly of foreign policy, Member States would have to align their positions in substance with the EU brief under the duty of loyalty enshrined in Article 24(3) TEU. Such loyalty had been exercised at least once before, namely on the question of the death penalty for mentally disabled persons in the US. Arguably, that was a true CFSP topic, as it did not concern EU companies or citizens, but the application of international human rights law towards US citizens. Here, the Council of the EU submitted an amicus brief in the *Atkins* case³⁶ for the European Union in 2002 – and the Member States did not concur or dissent with individual briefs. A similar approach was also taken on the question of the death penalty for juveniles in *Roper v Simmons*.³⁷ Again, the Council submitted a consolidated brief on behalf of the EU (together with the Council of Europe and seven other individual countries) to the US Supreme Court. After Lisbon, the situation has changed with respect to external representation, though. If the topic for an intervention before foreign courts would nowadays relate to the CFSP, such briefs could not be filed by the Council anymore, but would have to be submitted by the High Representative.

and Anthea Roberts, 'The Emerging Recognition of Universal Civil Jurisdiction' (2006) 100 AJIL 142.

34 See the brief of the European Union on the *Kiobel* case before the US Supreme Court (*Kiobel v Royal Dutch Petroleum Co* (2013) 133 SCt 1659 with annotation by I Wuerth (2013) 113 AJIL 601).

35 For a critical assessment of the Commission's reasoning on its standing in the *Sosa* amicus, see the European Commission's amicus brief in the *Alvarez Machain* case; online paper from the University of Leuven (2004) <https://www.law.kuleuven.be/iir/nl/onderzoek/opinions/CRamicuscuriaeILForum.pdf>.

36 *Atkins v Virginia* (2002) 536 US 304.

37 *Roper v Simmons* (2005) 543 US 551.

When turning to international litigation before international courts, the situation is no less complicated. Being a member of the WTO and a party to the Law of the Sea Convention, the EU can become a plaintiff or defendant. It can even make submissions before the International Court of Justice under certain circumstances.³⁸ However, it was again less certain how these acts of international representation are organized internally in the Union. In constant practice, the Commission took the floor for the Union before the WTO, UNCLOS dispute settlement bodies, the European Court of Human Rights, or – more recently – ICSID investment tribunals. It also formulated the positions inside the house, without asking the Council for prior approval. This practice came under scrutiny of the Council in particular when the Commission submitted a brief on an advisory opinion sought by the Sub-Regional Fisheries Commission from the International Tribunal on the Law of the Sea (ITLOS) on illegal, unreported and unregulated fishing.³⁹ Here, the Commission had decided to intervene in August 2013. It discussed and revised the broad substance in the Council Working Party in October and November, and submitted the final brief to ITLOS at the end of November. The Council felt that it was entitled to prior approval of the EU statement and brought an action before the Court of Justice to annul the Commission's decision. The Luxemburg judges clarified three important points. First, they confirmed the Commission's position that Article 355 TFEU embodies the general principle that the EU has legal capacity and is to be represented, to that end, by the Commission. Accordingly, the Commission can also represent the EU before international courts.⁴⁰ Second, the Court dismissed the Council's arguments in favour of prior approval. Submitting a brief 'before' an international tribunal could not be equated with taking an EU position 'in' an international body which takes decisions with legal effect on the EU.⁴¹ Thus, Article 218(9) TFEU, which gives the Council the right to determine such EU positions, was not applicable. Moreover, the Commission had not encroached into policy-making under Article 16(1) TEU. Its brief only explained to ITLOS long-standing EU policy on IUU fishing, as enshrined in numerous internal EU legal acts, thereby respecting

38 For an overview, see F Hoffmeister and P Ondrusek, 'The European Community in International Litigation' (2008) 61 *Revue Hellenique de Droit Intl* 205.

39 ITLOS Case No 21.

40 Case C-73/14, *Council of the European Union v European Commission*, Judgment of 6 October 2015, paras 58–9.

41 *ibid* paras 63–7.

the Council's prerogatives on policy-making.⁴² Third, the Court also emphasized that the Commission was obliged under Article 13(2) TEU to 'consult' the Council prior to its submission. This duty of sincere cooperation had been respected, though, because the Commission had discussed and revised its statement with the competent Council Working Party ahead of its final submission.⁴³

It follows that there is a clear-cut division of labour for international briefs. The Commission prepares the substance of the brief and consults the Council prior to its actual intervention. The substance of the brief should then duly reflect agreed EU policies, as laid down in internal legal acts, policy documents or as reflected in the discussions in Council on the matter. One commentator has advanced the view, though, that these European Court of Justice (ECJ) findings should only apply for proceedings before an international court whose outcome is not legally binding on the EU. He argued that only the Council could take a new and substantial obligation for the EU under international law.⁴⁴ This is not convincing. Every international judicial body decides on the basis of pre-established obligations duly ratified by the EU. An international ruling would interpret and apply them, but not create new obligations. Similarly, a Commission urging the international court to apply or interpret the existing EU obligation in one way or the other would not create a new substantive legal obligation either. Accordingly, the findings of the ECJ in the ITLOS advisory opinion case are also applicable for other international briefs. Hence, they will have some spill-over effect on the Commission practice in human rights, trade and investment cases, where the prior consultation of Council had not always been carried out.

3.4 Statements in bilateral meetings and international fora

The bread and butter of international diplomacy are statements in bilateral meetings or in international fora. For this activity, Article 221(1) TFEU makes the straightforward point that 'Union delegations in third countries and at international organisations shall represent the Union'. These delegations are placed under the overall authority of the HR (Article 221(2) TFEU). This also suggests that the HR has the internal power to instruct the Union delegations about when and what to

42 *ibid* paras 68–77.

43 *ibid* paras 84–90.

44 See D Engbrink, 'The European Union's External Action: Coherence in European Foreign Policy Despite Separate Legal Orders?' (2017) 44(1) LIEEI 5, 38–9.

say, if appropriate. Insofar as the topics relate to CFSP, this arrangement also makes sense: the Union delegations are just mirroring the power of the HR itself to represent the Union externally on CFSP matters.

But what is the situation for non-CFSP matters? The answer is that the external representation does not change. It was a clear decision of the Lisbon Treaty to upgrade the former Commission delegations to fully fledged Union delegations. Accordingly, the delegations are also empowered to represent the Union on non-CFSP matters under Article 221(1) TFEU. However, the internal instructions for those issues will not come from the HR. Rather, as laid down in the decision establishing the EEAS, the relevant Commissioners and their services in the headquarters can give binding instructions to the delegations in their respective area of competence.⁴⁵

While this matter has been sorted out between the actors, the situation is less satisfactory for ‘mixed’ statements. This relates to situations often seen in international organizations, where a topic may not only touch upon EU matters, but also ‘national’ matters. Some Member States, in particular the United Kingdom, insisted in 2011 that such statements should not be made ‘on behalf of the EU’, but also ‘on behalf of its Member States’. Lacking such an opening formula the UK went so far as blocking a number of EU statements in multilateral fora.⁴⁶ The issue was then brought to the attention of the Council, which issued in October 2011 a ‘General Arrangement’ on ‘EU statements in multilateral organisations’.⁴⁷ Under Point 4, 2nd bullet thereof, positions common to the EU and its Member States should be made ‘on behalf of the EU and its Member States’, whereas issues relating to the exercise of national competences should be made ‘on behalf of the Member States’ when the Member States agree to collective representation by an EU actor.

While this part of the text as such follows the logic of ‘mixity’, the Council also added the observation in Point 3, 5th bullet, that Member States ‘agree on a case by case basis whether and how to co-ordinate and be represented externally’. They may request ‘EU actors or a Member State, notably the Member State holding the rotating Presidency of the Council, to do so on their behalf’. While

45 Article 5(3) of Council Decision 2010/427/EU establishing the organization and functioning of the European External Action Service, OJ 2010, L201/30.

46 European External Action Service, Report by the High Representative to the European Parliament, the Council and the Commission, 22/12/2011, para 17.

47 Council of the European Union, Doc 15901/11 of 24/10/2011, reprinted in Kuijper and Wouters et al, *The Law of EU External Relations* (2nd edn, OUP 2015) 38–9.

Member States are indeed free to appoint whomever to represent them in an area of exclusive national competence, going for the Presidency seems to be against the spirit of the Lisbon Treaty: if there is merit in speaking with one voice also on those matters for 28 Member States, why not appoint the EU actor straightaway? This is all the more logical when dealing with an area of shared EU competence, which has not yet been exercised at EU level. Such an area is already conferred on the European Union by the treaty, albeit its exercise is only potential. In such a situation of (non-exercised) shared competence, the Member States should confine the external representation to an EU actor (and not the rotating Presidency).

Finally, specific situations may arise when the EU has internal competence on a subject matter discussed in an international forum, but is neither member nor observer in that very forum. In this situation, the Court has reminded the EU Member States that they cannot simply deny the EU dimension. When the international forum takes decisions binding on the EU, the Council shall internally prepare the EU position under Article 218(9) TFEU upon a proposal for the Commission. That EU position can then externally be represented by the Member States acting jointly in the interest of the Union.⁴⁸ Member States will then act as trustees of the Union in accordance with the pre-established position of the Union.⁴⁹

4. Recent practice in the common foreign and security policy

Turning to recent practice, we will now review two CFSP examples. The first relates to the multilateral negotiations with Iran on its atomic programme. Here, the role of the HR in representing the EU is largely acknowledged. It is hence interesting to review in more detail how the HR ‘came into play’ and how it exercised its powers. Second, we will look at the diplomatic efforts of the EU to reduce tensions between Russia and the Ukraine. In this bilateral conflict in the EU’s neighbourhood, Germany and France were much more visible than the EU as a

48 Case C-399/12, *Federal Republic of Germany v Council* (OIV), ECLI:EU:C:2014:2258, para 51 with a lucid commentary by I Govaere, ‘Novel Issues Pertaining to EU Member States Membership of Other International Organisations: The OIV Case’ in I Govaere et al, *The European Union in the World: Essays in Honour of Marc Maresceau* (Martin Nijhoff Publishers 2013) 225–43.

49 Erlbacher (n 11) 14.

whole. Conversely, that example may give some idea which factors play a role in preventing a stronger role for the HR.

4.1 Iran

The diplomatic efforts on containing Iranian nuclear activities spread over roughly 15 years. We will concentrate here on the institutional dimension of the EU's role. For this purpose, it is useful to divide the years 2002–16 into three main phases.

4.1.1 *The launch of negotiations and the first involvement of the HR*

Initially, after first signs of Iranian nuclear activity had been detected in Natanz, the International Atomic Energy Agency (IAEA) under its Director-General El-Baradei started to investigate the matter in August 2002. In May 2003, Iran informed the IAEA of its intention to construct the Iran nuclear research reactor, claiming that the use of uranium would be entirely peaceful. However, it soon turned out that with its limited powers the IAEA could not properly monitor Iranian activities on the ground. Following a critical report of El-Baradei to the IAEA board of governors in June 2003,⁵⁰ the governments of France, Germany and the UK thus started diplomatic efforts directly with the Iranian government. The three European governments could not see any identifiable civilian purpose of the programme and wanted to back the IAEA. Their foreign ministers Straw, de Villepin and Fischer thus sent a joint letter to their Iranian counterpart in August 2003.⁵¹

This initiative of the E-3 was met with some positive response in Teheran – Iran agreed to a joint statement on 23 October 2003 on the voluntary suspension of enrichment activities⁵² and actually did so according to the testimony of a high-ranking French official.⁵³ The IAEA was entrusted to follow the situation closely and monitor in particular the scope of the suspension.

50 IAEA, *Report by the Director General* (6 June 2003) GOV/2003/40.

51 Gary Samore, *Iran's Strategic Weapons Programmes: A Net Assessment* (International Institute for Strategic Studies/Routledge 2005) 18.

52 Iran declaration of 23 October 2003 from the three Foreign Ministers and the Iranian Foreign Minister, retrieved via the BBC (2003) http://news.bbc.co.uk/2/hi/middle_east/3211036.stm.

53 G Araud, Ambassador of France to the US, at the time of the initiation of the negotiations the director for strategic affairs in France, in Atlantic Council (2015), 'Europe and the Iran Nuclear Deal', transcript from a conference held in Washington on 26 May 2005 www.atlanticcouncil.org/news/transcripts/europe-and-the-iran-nuclear-deal, 1st intervention, 5th para.

At the same time, inside the EU, there was a perception by other Member States that they should be informed about the diplomatic activities of the Big Three. It appears that Paris had been the leading power behind the original initiative – and it had chosen Berlin as its close ally and London also as a proxy for Washington, which did not have diplomatic relations with Iran at the time. Moreover, a close coordination between the three powers was thought to be essential after the intra-EU division on the American invasion of Iraq – which had been supported by the UK, but opposed by Germany and France. But from the viewpoint of other capitals, these valid considerations should not absolve them from updating them in regular intervals as EU partners. Against that background, the then High Representative Javier Solana claimed a role to represent the EU at the negotiation table as of 2004. His efforts were successful – in the Paris Agreement of 15 November 2004, his involvement was officially acknowledged. The opening paragraphs of that text read:

The Government of the Islamic Republic of Iran and the Governments of France, Germany and the United Kingdom, *with the support of the High Representative of the European Union (E3/EU)*, reaffirm the commitments in the Tehran Agreed Statement of 21 October 2003 and have decided to move forward, building on that agreement. The E3/EU and Iran reaffirm their commitment to the NPT. The E3/EU recognise Iran's rights under the NPT exercised in conformity with its obligations under the Treaty, without discrimination. (...).⁵⁴

Importantly, this did not mean a substitution of the Big Three. Rather, the format was enlarged from 'E3' to 'E3/EU' (Germany, France, UK and the HR).

4.1.2 The deadlock in negotiations and the consolidation of the HR's role

With the election of Mr Ahmadinejad as President of Iran in June 2005, the progress achieved so far was put back. In August that year, Iran notified the IAEA of its intentions to resume its nuclear activities, and in September the IAEA found the country not to comply with its

54 IAEA, Communication dated 26 November 2004 Received from the Permanent Representatives of France, Germany, the Islamic Republic of Iran and the United Kingdom concerning the Agreement signed in Paris on 15 November 2004 (26 November 2004), INFCIRC/637, 3–4.

non-proliferation obligations.⁵⁵ Moreover, Ahmadinejad provoked the international community with the break of IAEA seals on the Natanz facility in January 2006. This made the E3/EU change the international format. In order to increase the pressure, they enlarged the negotiation group with other permanent members of the UN Security Council. Formally, the IAEA seized the United Nations Security Council (UNSC) in March 2006. The French foreign minister Douste-Blazy proposed a new format, including the US, Russia, China, UK, France plus Germany. After these states had agreed on a new package proposal in Vienna,⁵⁶ HR Solana transmitted it to Iran in June 2006 on their behalf. However, the proposal received a cold shower in Teheran.⁵⁷ In turn, the Security Council then urged Iran to stop its uranium enrichment-related and reprocessing activities under Article 40 of the Charter. §4 of Resolution 1696 (2005) read:⁵⁸

(The Security Council) Endorses, in this regard, the proposals of China, France, Germany, the Russian Federation, the United Kingdom and the United States, with the support of the European Union's High Representative, for a long-term comprehensive arrangement which would allow for the development of relations and cooperation with Iran based on mutual respect and the establishment of international confidence in the exclusively peaceful nature of Iran's nuclear programme.

The new group format then received two diplomatic abbreviations. From the UN perspective, it was the P5 + 1, indicating that it consisted of the five permanent members of the Security Council and Germany. From the EU perspective, it was the enlarged format of the previous E3/EU format, thus becoming EU/E3 + 3. The difference was not only semantic. While the UN abbreviation would just refer to six UN Member States, the EU formula would indicate with the notion EU/E3 that also the EU as such was part of the talks. A plain counting of actors

55 IAEA, Resolution adopted on 24 September 2005 (24 September 2005), GOV/2005/77, 2–3.

56 Elements of a Proposal to Iran as Approved on 1 June 2006 at the Meeting in Vienna of China, France, Germany, the Russian Federation, the United Kingdom, the United States of America and the European Union. The text is reproduced in the Annex to the letter dated 25 July 2006 from the Permanent Representative of France to the United Nations addressed to the President of the Security Council, United Nations Security Council, S/2006/521, 2–4.

57 Islamic Republic of Iran's response to the package presented on June 6, 2006 <http://www.isis-online.org/publications/iran/iranresponse.pdf>.

58 UNSC Resolution 1696 (2005) of 31 July 2006, §4.

would bring the format to seven persons, not six. Moreover, with the reversed order of EU/E3 instead of the former E3/EU another upgrade of the HR's role was implicit.

And indeed, the EU description of the evolving new format proved to be more accurate in subsequent practice. On the basis of UNSC Resolution 1696, Mr Solana consolidated the HR's role in the talks. Following two more Security Council Resolutions in December 2006⁵⁹ and March 2007,⁶⁰ he started one-on-one meetings with the Iranian chief negotiator. He first met Mr Larijani in Ankara (April 2007)⁶¹ and in Lisbon (June 2007).⁶² However, Ahmadinejad then replaced the moderate Larijani by Mr Jalili and the attempts came to a standstill. Importantly, the UNSC supported the HR's activity in March 2008. In §14 of its resolution 1803, it encouraged

the European Union High Representative for the Common Foreign and Security Policy to continue communication with Iran in support of political and diplomatic efforts to find a negotiated solution including relevant proposals by China, France, Germany, the Russian Federation, the United Kingdom and the United States with a view to create necessary conditions for resuming talks.⁶³

Despite this backing, a Solana trip to Teheran (June 2008)⁶⁴ and contacts between the EU/E3+3 with Jalili in Geneva (July 2008⁶⁵ and October 2009⁶⁶) were to no avail.

With the entry into force of the Lisbon Treaty, Mrs Ashton replaced Mr Solana in his office at the end of 2009. The new HR took

59 United Nations Security Council, Resolution 1737 (27 December 2006) S/RES/1737, para 18.

60 *ibid.*

61 Council of the European Union, summary of remarks by Javier Solana, EU High Representative for Common Foreign and Security Policy at the meeting with Dr Ali Larijani, Secretary-General of the Iranian Supreme National Security Council (2007) S130/07.

62 Council of the European Union, summary of remarks by Javier Solana, EU High Representative for Common Foreign and Security Policy after the meeting with Ali Larijani, Secretary-General of the Iranian Supreme National Security Council (2007) S188/07.

63 UNSC Resolution 1803 (2008) of 13 March 2008, para 14.

64 Council of the European Union, summary of remarks by Javier Solana, EU High Representative for the CFSP, at the press conference in Tehran (14 June 2008) S211/08.

65 Glenn Kessler, 'Iran Nuclear Talks End without Agreement' *The Washington Post* (19 July 2008) <http://www.washingtonpost.com/wp-dyn/content/article/2008/07/19/AR2008071900540.html>.

66 Council of the European Union, introductory remarks by Javier Solana, EU High Representative for the CFSP, at the press conference in Geneva following his meeting with Saeed Jalili, Secretary of the Iranian Supreme National Security Council (1 October 2009) S220/09.

cautious steps to upgrade her contacts with the Iranian side. Following a direct UNSC request in June 2010 to resume negotiations,⁶⁷ she delivered her first statements in EU/E3+3 talks with Jalili in December 2010 in Geneva⁶⁸ and January 2011 in Istanbul.⁶⁹ But also a new set of meetings in 2002 (Istanbul,⁷⁰ Baghdad,⁷¹ Moscow⁷²) failed. In October 2012 the EU widened the scope of its restrictive measures against Iran due to a lack of progress in the talks.⁷³

4.1.3 The closing of negotiations and the leading role of the HR

With the takeover by Mr Rouhani as President of Iran in August 2013, the final phase started. In October that year, first very detailed technical discussions took place. The HR was now in the driving seat and seized the momentum. In particular, she managed to create a good relationship with the new Iranian Foreign Minister Zarif, whom she proposed to bring into the talks personally.⁷⁴ Following two intensive rounds in Geneva between the EU/E3+3 and Iran in Geneva, the breakthrough was reached, when the two sides agreed on a Joint Plan of Action in November 2013.⁷⁵ Under the Plan,⁷⁶ Iran committed to freeze its enrichment activities and reduce the stockpiling of enriched uranium. The Plan established a Joint Commission and entrusted the IAEA to

67 United Nations Security Council, Resolution 1929 (9 June 2010) S/RES/1929, para 33.

68 Council of the European Union, statement by EU High Representative Catherine Ashton on behalf of E3+3 after the talks with Iran, Geneva 6–7 December 2010 (7 December 2010) A251/10.

69 Council of the European Union, statement by EU High Representative Catherine Ashton on behalf of E3+3 following the talks with Iran in Istanbul, 21 and 22 January 2011 (22 January 2011) https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/118915.pdf.

70 Council of the European Union, statement by High Representative Catherine Ashton on behalf of the E3+3 following the Talks with Iran, Istanbul, 14 April 2012 (14 April 2012) A173/12.

71 Council of the European Union, statement by Catherine Ashton, High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the Commission, following the talks of E3+3 with Iran in Baghdad (24 May 2012) A237/12.

72 Council of the European Union, statement by High Representative Catherine Ashton on behalf of E3+3 following the talks with Iran in Moscow (18–19 June 2012) https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131067.pdf.

73 Council of the European Union, 'Iran: EU Strengthens Sanctions over Lack of Progress in Nuclear Talks' (15 October 2012) 14803/12, Presse 422.

74 Gregor Peter Schmitz and Christoph Schult, 'Iran Nuclear Talks: Europe's Unsung Chief Diplomat' *Spiegel Online International* (1 October 2013) <http://www.spiegel.de/international/world/catherine-ashton-excells-in-western-talks-on-iran-nuclear-program-a-925514.html>.

75 EEAS, Joint Statement by EU High Representative Catherine Ashton and Iran Foreign Minister Javad Zarif (24 November 2013) http://eeas.europa.eu/statements/docs/2013/131124_02_en.pdf.

76 For a summary of the Joint Plan of Action of November 2013, see the EEAS fact sheet at http://www.eeas.europa.eu/statements/docs/2013/131219_02_en.pdf.

verify the nuclear-related measures. This was carried out in good faith, and when Mrs Ashton had to leave office in October 2014, the parties were close to a final deal. In a meeting with Zarif in Vienna in November, though, the comprehensive settlement could not be reached. Rather, the two protagonists (Ashton speaking for the EU/E3+3) agreed to carry on with their diplomatic efforts until 30 June 2015.⁷⁷

The EU Council thus asked Ashton to continue her diplomatic role, although the function of HR was now in the hands of Federica Mogherini. Curiously, the new HR thus appointed the previous HR as her diplomatic advisor on Iran!⁷⁸ In reality, though, the continuity was assured by EEAS Political Director Helga Schmid, who also managed to receive the trust of her new superior. In spring 2015, Mrs Ashton silently left the stage, with the effect that Mrs Mogherini became formally in charge. Following an agreed outline of the deal from Lausanne (April), and almost 17 days of uninterrupted negotiations past the initial deadline of 30 June with the United States as a driving force, the final settlement was reached on 14 July 2015 in Vienna. This 'Joint Comprehensive Plan of Action' was welcomed by the UN Security Council in Resolution 2231.⁷⁹ It is not a legally binding treaty, but a political MoU. Inside the EU (and more importantly: the United States), no ratification was hence needed. As Iran fully abided by its political commitments, the EU lifted all its nuclear-related financial sanctions in January 2016.⁸⁰ A Joint Statement delivered by HR Mogherini and the Iranian Foreign Minister Zarif on this historic 'Implementation' Day⁸¹ basically confirmed that the High Representative had taken over the leading role in the EU/E3+3 format.

4.2 Ukraine

With respect to the Ukraine, intense EU foreign policy efforts date back to the days of the Orange Revolution in late 2004. When protests culminated about election fraud of the 2nd round of presidential

77 EEAS, Joint Statement by Catherine Ashton and Iranian Foreign Minister Mohammad Javad Zarif following the talks in Vienna (24 November 2014) http://eeas.europa.eu/statements-eeas/2014/141124_02_en.htm.

78 EEAS, High Representative Federica Mogherini appoints Catherine Ashton as her Special Advisor for Iran talks (5 December 2014) http://eeas.europa.eu/statements-eeas/2014/141205_04_en.htm.

79 United Nations Security Council, Resolution 2231 (20 July 2015) S/RES/2231.

80 Council of the European Union, Joint Comprehensive Plan of Action and Restrictive Measures (2016) <http://www.consilium.europa.eu/en/policies/sanctions/iran/jcpoa-restrictive-measures/>.

81 EEAS, Joint Statement by EU High Representative Federica Mogherini and Iranian Foreign Minister Javad Zarif (16 January 2016) http://eeas.europa.eu/statements-eeas/2016/160115_01_en.htm.

elections on 21 November, allegedly won by Prime Minister Yanukovych, a roundtable between the Ukrainian protagonists (President Kuchma, Yanukovych and his challenger Yushchenko) was organized with a number of international mediators. Interestingly, among them were the Polish President Kwasniewski, the Lithuanian President Adamkus and – for the European Union – HR Solana. Moreover, the Secretary-General of the Organization for Security and Co-operation in Europe (OSCE), Kubis, and the President of the Russian Duma, Gryzlov, participated. It appears that this ad-hoc format proved rather effective. While Gryzlov focused on stating strong Russia support for Yanukovych only and Kubis was limited due to diverse OSCE membership, Solana took on the role to bring in the institutional weight of the European Union with 25 foreign ministers watching him. In the view of the then US ambassador to the Ukraine, Pifer, Solana took a cautious approach, being sensitive to the Russian angle. He apparently did not want a misstep in Kiev which could complicate EU–Russian relations.⁸² This, in turn, left policy space for Kwasniewski to emerge as the most influential mediator in those talks, also benefiting from his pre-existing personal relationships with the Ukrainian players. Even though he was not formally representing the EU, his line was fully compatible with the EU's objectives to find a peaceful solution that would allow free and fair elections to be conducted in the country. In the end, the roundtable agreed on 8 December to a change in the composition of the discredited Electoral Commission, a re-run of the second election round and broader constitutional reforms. That was a crucial step for peaceful change of government later on. After the re-run of the 2nd round on 26 December 2004, Victor Yushchenko emerged as the winner with 52 per cent of the vote and took office in January the following year, rather than Yanukovych, whose support stalled at 44 per cent. To a certain degree, this successful turn in the democratic development of the country can also be attributed to the EU High Representative and the active part of the EU's new Member States.⁸³

In the post-Lisbon period, the EU became again very active in the Ukraine–Russia conflict 2013–15. Here, we can distinguish between three phases. In this case, though, the involvement of the HR does not increase, but goes back over time.

82 R Kosc-Harmatiy, *European Mediators and Ukraine's Orange Revolution*, the Wilson Centre 2011, quoting the former US Ambassador Pifer to Ukraine <https://www.wilsoncenter.org/publication/european-mediators-and-ukraines-orange-revolution>.

83 For an interesting analysis see M Roth, 'EU–Ukrainian Relations after the Orange Revolution: The Role of the New Member States' (2007) 8(4) *Perspectives on Eur Pol and Soc* 505.

4.2.1 *The Russian intervention into Ukrainian affairs and early HR diplomatic efforts*

At the EU summit with the six countries of the Eastern Partnership⁸⁴ in Vilnius in November 2013, the stage was set for the signature of the EU–Ukraine Association Agreement, including a deep and comprehensive free trade agreement. The negotiations had been conducted for a long time, including under the pro-Russian President Yanukovich and his government. However, a couple of weeks before the summit, the Ukrainian leader changed his mind, most probably upon heavy pressure from Moscow. He refused to sign the text, which triggered political turmoil in Kiev. Demonstrations at the main square (Maidan) in the cold winter lasted longer than expected, and when Ukrainian security forces started to shoot at protesters on 22 January 2014 (condemned by the HR)⁸⁵ the protesters demanded the departure of President Yanukovich altogether.

At that critical juncture, the 32nd EU–Russian summit was scheduled in Brussels on 28 January. The European Council President van Rompuy welcomed President Putin and had the following to say on Ukraine:

The European Union is closely following the developments in Ukraine and strongly condemns violence. We call for restraint. Those responsible have to be held to account. We want the fundamental freedoms – such as freedom of expression and of assembly – preserved. The present stalemate must be rapidly overcome through a genuine dialogue between the authorities, the opposition and civil society. The Ukrainian authorities have a special responsibility in this. It is crucial to find a way forward in the interest of the Ukrainian people. *EU High Representative will be travelling to Kiev in a few hours.* For our part, we are ready to move ahead and to sign and implement our association agreement, already initialled a year ago, provided the authorities confirm their adherence to a democratic Ukraine. The respect for sovereign countries' freedom of choice on foreign policy, regional economic cooperation and trade is a fundamental right and a principle I stressed today once again.⁸⁶

84 Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine.

85 EEAS, Statement by EU High Representative Catherine Ashton on violence and reported deaths of protesters in Kiev (22 January 2014) 140122/01.

86 European Council, remarks by President of the European Council Herman Van Rompuy following the 32nd EU–Russia summit (28 January 2014) EUCO 27/14, Presse 23, PR PCE 21 (emphasis added).

However, Putin was not happy about the perspective of an EU emissary to Kiev. He bluntly told Lady Ashton (and Stefan Füle, the Enlargement Commissioner who accompanied her), not to get involved: ‘The more intermediaries there are, the more problems there are’.⁸⁷ Nevertheless, Ashton and Füle went to Kiev on 31 January 2014,⁸⁸ and the HR also came back a second time in the week after⁸⁹ in an EU effort to mediate between the government and opposition.⁹⁰ However, when the situation came to the crunch, she was not in town. Rather, on 20 February she chaired a Foreign Affairs Council in Brussels, which deliberated about new sanctions and preferred to send two ministers as EU envoys to Kiev. So, on 21 February, an agreement was brokered in Kiev between President Yanukovych and the opposition for early elections with the help of the Foreign Ministers of Germany (Steinmeier), Poland (Sikorski), a high official from the Foreign Ministry (Forunier) and the Russian Human Rights Commissioner (Lukin).⁹¹ However, on the next day, Yanukovych fled the country. Mrs Timoschenko was released from prison and her deputy party leader was appointed interim president. HR Ashton applauded these new developments from Brussels and hoped for a stable, prosperous and democratic future for Ukraine.⁹²

4.2.2 *The annexation of Crimea and EU sanctions*

Tragically, the Kremlin did not share this vision. Rather, it used the weakness of the new interim government in Kiev to destabilize its neighbour. Paramilitary troops emerged in the Crimea, a predominantly Russian-speaking region that had belonged to Russia in Soviet times. Moreover, armed separatists took power in Simferopol and a couple of cities. They called for an independence referendum in breach of

87 Ian Traynor, ‘Vladimir Putin Tells Brussels to Stay Out of Ukraine’s Political Crisis’ *The Guardian* (28 January 2014) <https://www.theguardian.com/world/2014/jan/28/vladimir-putin-ukraine-crisis-eu>.

88 EEAS, statement by EU High Representative Catherine Ashton following her meeting with Ukrainian Opposition (31 January 2014) 140131/05.

89 EEAS, remarks by EU High Representative Catherine Ashton at the end of her visit to Kiev, Ukraine (5 February 2014) 140205/03.

90 G Wiegand and E Schulz, ‘The EU and its Eastern Partnership: Political Association and Economic Integration in a Rough Neighbourhood’ in C Herrmann et al (eds) *Trade Policy Between Law, Diplomacy and Scholarship, European Yearbook of International Economic Law* (Springer 2015) 321, 323.

91 Ministry of Foreign Affairs of Ukraine, agreement to resolve the crisis in Ukraine was signed in Kiev (21 February 2014) <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18110-21-lyutogo-cr-u-kijevi-pidpisano-ugodu-z-vregulyuvannya-krizi-v-ukrajini>.

92 EEAS statement by EU High Representative Catherine Ashton on the latest developments in Ukraine (22 February 2014) 140222/01.

the Ukrainian constitution, and on 1 March, the Russian Parliament empowered the President to send Russian armed forces to the Crimea. This obvious breach of the UN Charter and the OSCE Final Act was immediately condemned by the Foreign Affairs Council on 3 March 2014. The ministers also called on HR Ashton to ‘continue her contacts with all parties with a view to contributing to a peaceful resolution of this crisis’.⁹³ However, there is no trace of any such activity. Rather, by vote of 16 March 2014, which was neither free nor fair, 97 per cent of the inhabitants in the Crimea are said to have declared their wish to become part of the Russian Federation. That step was executed a day after the referendum. The European Council qualified it as an act of annexation and imposed sanctions upon Russia in an extraordinary meeting.⁹⁴ Moreover, the EU (Council President van Rompuy and Commission President Barroso) and the interim Ukraine government (PM Yatseniuk) signed the political provisions of the EU–Ukraine Association Agreement on 21 March 2014 to underline the firm pro-Western course of the new Ukrainian leadership.

4.2.3 The fight over eastern Ukraine and EU involvement from Geneva to Minsk I

Even worse, shortly after the annexation of the Crimea, troubles in eastern Ukraine intensified. This time, Mrs Ashton took some initiative. She explained to the Foreign Affairs Council that she had invited the foreign ministers of the United States, Russia and Ukraine for talks in Geneva.⁹⁵ At the meeting of 17 April, these four powers called, *inter alia*, for the disarmament of all illegal armed groups and the return of illegally seized buildings in exchange for amnesty and asked a special OSCE monitoring mission to help the Ukrainian government in implementing de-escalation measures.⁹⁶ Moreover, the EU offered help in numerous ways. It not only promised economic and financial help to

93 Council of the European Union, Press Release 3305th Council Meeting Foreign Affairs (3 March 2014) 7196/14, Presse 114, PR CO 13, 7.

94 Council Decision 2014/145/CFSP of 17 March 2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine (17 March 2014) OJ L78, 16–21. For the subsequent implementation of the Crimea-related sanctions see F Hoffmeister, ‘The Practice of the European Union with Respect to the Territorial Integrity of and Border Disputes between States’, in Société Française pour le Droit International (ed), *Droit des Frontières Internationales/The Law of International Borders* (Pedone 2016) 277, 281–3.

95 Council of the European Union, Press Release 3309th Council Meeting Foreign Affairs (15 April 2014) 8763/14, Presse 219, PR CO 21, 2.

95 Council of the European Union, Press Release 3309th Council Meeting Foreign Affairs (15 April 2014) 8763/14, Presse 219, PR CO 21, 2.

96 EEAS, Geneva Statement on Ukraine (17 April 2014) 140417/01.

Ukraine; Commission President Barroso also accepted President Putin's proposal for consultations with Russia and Ukraine – trilateral consultations – on the security of gas supply and transit, as remarked in the EU–US press conference after the Geneva meeting.⁹⁷ That was an important gesture as the outstanding gas debts of Kiev to Gazprom could probably only be paid with EU credits.

However, that moment of diplomatic glory was short-lived. A downwards spiral of violence was already registered at the end of April.⁹⁸ Moreover, the regions around Donetsk and Luhansk held referenda and declared their independence in mid-May. This triggered another round of sanctions, with the Foreign Affairs Council adding more persons on the list.⁹⁹ The only positive development was that the presidential elections in Ukraine were properly conducted on 25th May, leading to the inauguration of Piotr Poroshenko as the new democratic leader of the country.

In this tense situation, an ad hoc group gathered in Normandy on 6 June 2014. Meeting on the occasion of D-Day, to commemorate the landing of the Allies in France in 1944 in their war against Germany, the heads of states of France and Germany brought the newly elected Ukrainian President Poroshenko and the Russian President Putin together for 15 minutes before the official lunch.¹⁰⁰ In this 'Normandy format' the developments in eastern Ukraine were touched upon, but also the economic relationship between Ukraine and the EU. One of the official Russian concerns was that with the renewed Ukrainian commitment to also sign the rest of the EU Association Agreement, the enlarged trade relations between Kiev and Brussels would be necessarily to the detriment of Russia. Putin seems to have urged his counterparts to stop such a move, or at least to take Russian interests sufficiently into account.

During the summer months, the tension grew. On 27 June, Poroshenko signed the remaining parts of the EU–Ukraine Association Agreement, seen as a hostile act by Moscow. The new Ukrainian

97 US Department of State, remarks with EU High Representative Catherine Ashton after their meeting (April 17 2014) <http://m.state.gov/md224947.htm>.

98 EEAS, statement by EU High Representative Catherine Ashton on the EU response to the worsening security situation in eastern Ukraine (29 April 2014) 140429/02.

99 Council Implementing Regulation (EU) No 477/2014 of 12 May 2014, Implementing Regulation (EU) No 269/2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine (12 May 2014) OJ L137, 3–5.

100 John Irish, Jeff Mason and Alexei Anishchuk, 'Putin, Ukraine Leader Break Crisis Ice at D-Day Event' Reuters (6 June 2014) <http://www.reuters.com/article/us-dday-anniversary-idUSKBN0EG2V020140606>.

Minister for Defence ruled out a unilateral ceasefire on 8 July, and on 17 July a civil plane (MH 17) was shot over Ukrainian territory probably by pro-Russian separatists. Heavy fighting also occurred on the Donetsk airport. Following a decision of the European Council of 16 July, the EU Council enacted on 22 July a further round of sanctions, this time targeting investment into the Crimea.¹⁰¹

Against that background, the President of Belarus, Lukashenko, held an unusual diplomatic gathering in Minsk at the end of August 2014 between the Eurasian Economic Union, the Ukraine and the EU. While Putin (for Russia), Nazarbaev (for Kazakhstan) and Poroshenko (for Ukraine) accepted, President Barroso (for the European Union) excused himself. He phoned Poroshenko and Putin on 11 August,¹⁰² and let himself be represented in Minsk by an unusual Troika, namely the HR Ashton, Trade Commissioner De Gucht and Energy Commissioner Öttinger. The HR would cover the foreign and security aspects, while De Gucht would look at the Russian worries over the trade effects of the EU–Ukraine Association Agreement on Russia. Öttinger would be available to advance the trilateral gas talks. After the Minsk-meeting the three made a joint statement for the EU.¹⁰³

The outcome of the Minsk I meeting was threefold. First, following a long bilateral talk between Putin and Poroshenko (HR Ashton was not allowed) after the restricted dinner, the two leaders agreed on the broad outline for a ceasefire agreement with some political commitments to enhance autonomy of eastern Ukrainian regions. That very night, though, Russian troops entered Ukrainian territory in a blunt breach of confidence just built up between the two leaders. Nevertheless, their representatives hammered out a 12-point agreement that was formally signed on 5 September under the auspices of the OSCE.¹⁰⁴ The OSCE called this process a ‘Trilateral Contact Group’ (OSCE, Russia, Ukraine) which also brought in representatives of the self-declared Donetsk People’s Republic and the

101 Council of the European Union, Foreign Affairs Council (22 July 2014) <http://www.consilium.europa.eu/en/meetings/fac/2014/07/22/>.

102 European Commission, President Barroso: phone calls with President Poroshenko and President Putin on the situation in Ukraine (11 August 2014) http://europa.eu/rapid/press-release_IP-14-921_en.htm.

103 EEAS, press remarks of the EU Representatives at Minsk Meetings (26 August 2014) 140826/02 http://www.eeas.europa.eu/archives/ashton/media/statements/docs/2014/140826_02_en.pdf.

104 Ministry of Foreign Affairs of Ukraine, Protocol on the results of consultations of the Trilateral Contact Group (Minsk, 5 September 2014) (8 September 2014) <http://mfa.gov.ua/en/news-feeds/foreign-offices-news/27596-protocol-on-the-results-of-consultations-of-the-trilateral-contact-group-minsk-05092014>.

Lugansk People's Republic. Second, Trade Commissioner De Gucht replied to President Putin's repeated statement that the 'Normandy' leaders had promised him to bring a solution on the possible negative effect of Ukraine's economic rapprochement to the West. In fact, the Commissioner offered in Minsk that a trilateral meeting between him and the two foreign ministers from Ukraine and Russia could review the trade impact of the EU Association Agreement on Russia – to be scheduled on 12 September that year in Brussels. In that gathering, the three representatives from the Commission, Russia and Ukraine then found an agreement on the way forward. Brussels accepted to exclude the trade parts of the EU Association Agreement from provisional application,¹⁰⁵ while going ahead with the ratification by the European and the Ukrainian Parliament of the entire agreement on 16 September. This great gesture to ease Russian economic pain in a broader context of de-escalating the conflict would, however, be limited for two years. During that period, trilateral consultations could continue in order to identify potential avenues to adapt certain trade provisions in the agreement if warranted. Third, Commissioner Öttinger would accelerate the trilateral gas talks. These were eventually concluded on 25 September.¹⁰⁶

4.2.4 The negotiation of the Minsk II Agreement in the absence of the EU

While Minsk I thus provided a temporary relief to the trade and gas issues, the ceasefire did not hold for too long. Already at the end of September, heavy fighting occurred around the Donetsk airport. In Federica Mogherini's second day in office as the new HR, on 2 November, purported parliamentary and presidential elections were held in Lugansk and Donetsk, which she qualified as new obstacles for peace in Ukraine.¹⁰⁷ At the same time, France kept a direct channel to Russia. On 6th December, President Hollande met Putin during a stopover in Moscow on his trip to Kazakhstan, stating: 'Tension, pressure is never the solution. We must try to engage – and

105 European Commission, Joint Ministerial Statement on the implementation of the EU-Ukraine AA/DCFTA of 12 September 2014 http://europa.eu/rapid/press-release_STATEMENT-14-276_en.htm.

106 European Commission, EU-Ukraine-Russia talks agree on the terms of a binding protocol to secure gas supplies for the coming winter http://europa.eu/rapid/press-release_STATEMENT-15-5724_en.htm.

107 EEAS, HRVP Mogherini talks to US Secretary of State Kerry on her first day in office (1 November 2014) http://eeas.europa.eu/top_stories/2014/mogherini_first_day_us_eu_en.htm.

*I have done so with President Putin, Madame Merkel and President Poroshenko – we must engage in a de-escalation process, verbally first of all, which must then be a de-escalation in the events occurring in Ukraine’.*¹⁰⁸

As of January 2015, the situation escalated further on the ground in eastern Ukraine. The OSCE’s Trilateral Contact Group intensified its diplomatic efforts, and according to HR Mogherini the EU helped in this process behind the scenes at official and FM level.¹⁰⁹ She also condemned the Mariupol bomb attacks on 24 January 2015, most probably carried out by pro-Russian forces from Donetsk, and called an extraordinary meeting of the EU Foreign Ministers.¹¹⁰ At the meeting of 29 January 2015, the Foreign Affairs Council agreed in principle to put new targeted sanctions on Russia,¹¹¹ which were formally adopted a week later by the Council on 7 February 2015.

While the fighting still continued the mediation was put at the level of heads of state. For this, only the German Chancellor Merkel and the French President Hollande went to Kiev and Moscow in early February to present a new peace plan.¹¹² Soon thereafter, a second summit was staged in Minsk, where the two leaders met Putin and Poroshenko together. After 16 hours of negotiations, a new ceasefire agreement with much more detailed accompanying measures was agreed upon. Again, it was formally signed by the OSCE Trilateral Contact Group on 16 February 2015 (Minsk II).¹¹³ Nobody was present for the EU – neither European Council President Tusk nor HR Mogherini. Rather, the two welcomed the deal in Brussels and Mogherini phoned the Russian FM Lavrov to talk about implementation soon thereafter.¹¹⁴

108 RFI, ‘Désescalade’ en Ukraine: Rencontre Poutine-Hollande à Moscou (6 December 2014) <http://www.rfi.fr/europe/20141206-ukraine-rencontre-surprise-poutine-hollande-moscou> (emphasis added).

109 P Valentino, ‘Mogherini: “Me Excluded? What Matters is Team Game and the Policy is That of All of Europe”’ (15 February 2015) *Corriere della Sera*.

110 EEAS, High Representative Federica Mogherini to convene Extraordinary Foreign Affairs Council on Ukraine on 29 January (25 January 2015) http://eeas.europa.eu/statements-eeas/2015/150125_02_en.htm.

111 EEAS, Results of the Foreign Affairs Council of 29 January 2015 <http://www.consilium.europa.eu/en/meetings/fac/2015/01/29/>.

112 Richard Balmforth and Pavel Polityuk, ‘German, French Leaders Take Ukraine Peace Plan to Moscow’ Reuters (5 February 2015) <http://www.reuters.com/article/us-ukraine-crisis-idUSKBN0L910W20150205>.

113 Full Text of the Minsk Agreement, *Financial Times* (12 February 2015) <https://next.ft.com/content/21b8f98e-b2a5-11e4-b234-00144feab7de>.

114 EEAS, phone call between HRVP Federica Mogherini and Russian Foreign Minister Sergei Lavrov (26 February 2015) http://eeas.europa.eu/statements-eeas/2015/150226_03_en.htm.

Ever since then, this group of the German, French, Ukrainian and Russian leaders was referred to as the 'Normandy format'. While the daily monitoring of the implementation of Minsk II was laid into the hands of the OSCE, the Normandy leaders were the leading forces inside the EU. Based on their guidance the EU continued its measured sanctions regime against Russia. In August 2016, in a surprise diplomatic move, the Russian Putin pulled out of this format. He alleged that Ukrainian military intelligence had been preparing terrorist acts against the Crimea to undermine Russian elections in the breakaway territory for September. To end this provocation, said the Russian president, he would be no longer ready to meet his Ukrainian counterpart Poroshenko and the German and French leaders in the so-called Normandy format.¹¹⁵

5. Comparison

When comparing the two cases, a couple of observations can be made. First, the Iran negotiations are a good example of how the role of the EU has grown over time. This is probably due to the fact that the HR could provide for unity between world powers that do not usually work very well together. Indeed, the unity of the EU3, plus US, China and Russia was not put in jeopardy, even when the Ukrainian conflict soured relations between the West and Russia.¹¹⁶ For this sextet, the HR proved to be a welcome spokesperson. Moreover, Iran had no misgivings over the EU in particular, knowing that the European powers were in general more interested in resuming normal trade and economic relations with Teheran than the other members of the UN Security Council. In this diplomatic framework, the HR could provide the necessary input to such an extent that even the transfer of the role from Solana over Ashton to Mogherini did not make a difference.

In contrast, the Ukrainian case shows the limited interest of Russia to let proper EU actors be involved in questions of its national security and foreign policy. Moscow has a traditional policy of reserve against the Brussels institutions and is more used to dealing with individual

115 K Hille and R Olearchyk, 'Putin Quits Peace Talks after Accusing Ukraine of "Incursion" into Crimea' *Financial Times* (11 August 2016) 1.

116 P Wittig, German Ambassador to the US, Atlantic Council (2015). Europe and the Iran Nuclear Deal, transcript from a conference held in Washington on 26 May 2005 <http://www.atlanticcouncil.org/news/transcripts/europe-and-the-iran-nuclear-deal>, 2nd intervention, 2nd para.

Member States instead.¹¹⁷ This was felt already in the Geneva talks in April 2014, further exemplified in the treatment of HR Ashton in Minsk I, and culminating in the clear wish from Putin only to deal with Merkel and Hollande in Minsk II. He was neither interested in negotiating with a Polish President of the European Council, nor would the Russian Foreign Minister accept HR Mogherini as a legitimate counterpart in security-related talks. Only when this is unavoidable, as in trade and energy-talks, would the Russian side be prepared to engage with the relevant EU Commissioners, knowing that they call the shots on the other side.

It can hence be concluded that the external representation of the EU in CFSP matters is not only dependent on the internal (legal) arrangements, but also to a surprisingly high degree by the acceptability of the EU actor by the third country in question. For the effectiveness and coherence of the EU's foreign policy, this is far from ideal. The Iran experience shows that involvement of the HR fulfilled at least two functions. It not only helped to forge an international alliance, but it also made sure that sensitive information could flow inside the EU between all Member States. In contrast, the Normandy format gave rise to doubts as to whether Germany and France would be tough enough vis-à-vis Russia and at the same time properly represent the concerns of other EU Member States, in particular the Eastern European ones.¹¹⁸ Moreover, the suspicion levelled against the leading EU actors because of their nationality (the Italian HR Mogherini being seen as too Russian-friendly, while the Polish Council President Tusk seen as too Russian-unfriendly) did not help in boosting their credibility to be able to speak for the EU as a whole. Finally, as HR Ashton had given precedence to the Iran nuclear talks over the Ukraine, HR Mogherini probably paid a price for that, lacking any established institutionalized EU role which she could have taken over from her predecessor. This perception could only be changed if the EU leaders would indiscriminately insist that the EU High Representative cannot be sidelined even in difficult cases. Clearly, in the Ukrainian conflict there was also a defined EU policy (non-recognition of the annexation in Crimea and containing the destabilization in eastern Ukraine) that she could have represented.

117 R Allison, "Russia in Europe" or "Russia and Europe"?, in R Allison, M Light and S White (eds), *Putin's Russia and the Enlarged Europe* (Chatham House Papers) (Wiley-Blackwell 2006) 160–80.

118 S De Galbert, 'The Impact of the Normandy Format on the Conflict in Ukraine: Four Leaders, Three Cease-fires, and Two Summits' (Center for Strategic and International Studies 2015) <http://csis.org/publication/impact-normandy-format-conflict-ukraine-four-leaders-three-cease-fires-and-two-summits>.

6. Recent practice in integrated external policies

In the field of integrated external policies, such dilemmas of external acceptance of the EU representatives do not exist to the same extent. However, when looking at recent practice from trade and international environment negotiations, a number of other internal discussions emerged.

6.1 Trade

In the EU's common commercial policy, the starting point is easy. The EU is represented by the Commission, which has to consult with the Council in policy-making. Article 207(3) TFEU repeats the general procedural rules on treaty-making and adds that 'the Commission shall report regularly to the special committee and to the European Parliament on the progress of negotiations'. This reporting obligation to the European Parliament echoes Article 218(10) TFEU, which gives the Parliament a right to be immediately informed about treaty negotiations in other fields as well. What is more important for external representation is the approach of the Council towards the negotiation powers of the Commission.

6.1.1 *Bilateral trade agreements*

For bilateral trade agreements, there is a strong tendency to insist on mixity even though trade is a field where the Lisbon Treaty expanded the EU's powers considerably. As a result, the post-Lisbon EU trade agreements with South Korea, with Central America, and with Peru and Colombia were all concluded by the EU and all its Member States together. Luckily, though, the Council did not go so far as to impose a second negotiator for the alleged 'national' competences as well. Rather, even in situations where it earmarked already in the negotiating directives that it regarded some future aspects of the agreement as falling into mixed competence (such as some aspects of the investment chapter in TTIP),¹¹⁹ the Council appointed the Commission only as EU negotiator under Article 218(3) TFEU. It can

119 See §22 of the negotiating directives with the US of 17 June 2013: 'The aim of negotiations on investment will be to negotiate investment liberalisation and protection provisions including areas of mixed competence, such as portfolio investment, property and expropriation aspects, on the basis of the highest levels of liberalisation and highest standards of protection that both Parties have negotiated so far' (reprinted in Kuijper and Wouters et al, *The Law of EU External Relations, Cases and Materials* (2nd edn, OUP 2015) 60).

be inferred that the Council was hence convinced that in the trade field two chief negotiators (one for the EU part and one for the claimed national part) do not strengthen the EU's hand in the negotiations. A reason for this consideration may be that the national part is contested between the Commission and the Council and in any way forms only a minor part of the overall substance. Nevertheless, the insistence on mixity all the time has driven the Commission to ask for an opinion of the European Court of Justice on the division of competences under Article 207 TFEU in the case of the Singapore trade agreement. This opinion will be of crucial importance for the future of EU trade agreements.

In addition, there is a certain tendency in the internal deliberations of the Council to come up with more and more red lines which the Commission is asked to respect. This is due to the fact that modern trade agreements touch upon a variety of policy fields where sometimes strong national interests are at stake. Guiding through these divergent expectations from different Member States (and the European Parliament with sometimes opposing tendencies) has thus become more and more of a challenge for the Commission.

6.1.2 The EU at the WTO

The Council has shown remarkable flexibility when it comes to external representation at the WTO. As is well known, both the EU and all its Member States are full members of the organization according to Article XI of the Marrakesh Agreement. However, in practice, all important matters are conducted by the Commission: Doha negotiations,¹²⁰ trade policy reviews and disputes. Moreover, there has been a remarkable breakthrough when dealing with personnel matters, which are traditionally claimed by the Member States as falling under national competence. When the WTO was in search of a new Director General in 2013 as a successor to Pascal Lamy, the EU coordinated internally in the Trade Policy Committee in Brussels and submitted its preferences via the EU WTO ambassador in Geneva to the other WTO members. It seems that there was a silent agreement between the Commission and the Council to leave competence battles aside and concentrate on the functional necessity to remain united instead. After all, 28 identical votes of the EU are more influential than the scattered behaviour of the

120 At the 9th Ministerial Conference in Bali in December 2013, President Barroso even sent three Commissioners: Trade Commissioner De Gucht, Agricultural Commissioner Ciolos and – in view of the impact of the Trade Facilitation Agreement on the EU's customs regime – the Commissioner for Customs Matters Semeta.

Member States which could be traced back in the pre-Lamy elections between Supachai and Moore in 2002.¹²¹

7. Environment

Similar challenges of leverage on international processes have also been identified in the area of the EU's external environmental policy. Internal environmental policy always fell into shared competence under former Articles 174/175 TEC, and the Lisbon Treaty did not change this (Article 4(2)(e) TFEU). Except where the EU has become exclusively competent externally through extensive internal legislation that may be affected by international rules (Article 3(2) TFEU), the EU and its Member States are thus jointly competent for this area internationally. However, the Lisbon reform on external representation can also be felt in this field, as we will show with two examples. First, the Lisbon Treaty changed the EU arrangements in international environmental conferences, which most of the time do not adopt binding law. The prototype is the gathering of the 'Conference of the Parties' under the UN Framework Convention on Climate Change (UNFCCC). Second, new formats emerged for international negotiations for legally binding environmental agreements.

7.1 Multilateral climate change negotiations

Under the UNFCCC, the conference of parties have gathered on an annual basis since Berlin COP1 in 1995. As the EU had been a driving force for the UNFCCC itself, it also tried to play a leadership role in the subsequent negotiations concerning emission standards for the period beyond 2000.¹²² Although it was known from the beginning that the COPs should strive for the adoption of a legal instrument,¹²³ the EU set up an ad hoc format for its external representation. The Council nominated the sitting Presidency as chief negotiator, to be assisted by the incoming Presidency and the Commission. This informal troika

121 F Hoffmeister, 'The European Union in the World Trade Organization – A Model for the EU's Status in International Organisations?' in C Kaddous (ed), *The European Union in International Organisations and Global Governance* (Hart Publishing 2015) 121, 134.

122 K Kulovesi, 'Climate Change in EU External Relations: Please Follow My Example (or I Might Force You)' in E Morgera (ed), *The External Environmental Policy of the European Union* (CUP 2012) 115–48, 121–3 with a precise overview about the EU's negotiations for the Kyoto Protocol.

123 UNFCCC Decision 1/CP.1 (1995).

would act on the basis of a previously defined common position laid down by Council¹²⁴ (acting by consensus). This system had a number of drawbacks.

First, at COP3 in Kyoto, the Council's common position from March 1997 proved inflexible and the EU spent much negotiating time with itself.¹²⁵ Only thanks to the relative weakness of the US and other actors, it was still able to steer the Kyoto Protocol of December 1997 near to the main EU negotiation objectives.¹²⁶ The Union also secured a consensus on the implementing rules (the 'Marrakesh accords' 2001) and brought about the entry into force of the Kyoto Protocol in exchange for concessions towards Russia in its WTO accession course.¹²⁷

A more serious second drawback of the EU's internal arrangements was the ever-changing chief negotiator every six months. At COP6 in The Hague (2000), for example, the French presidency was unable to coordinate well inside the EU camp and the UK even conducted bilateral negotiations with the US on the controversial issue of sinks. The UK-US deal then proved unacceptable to some other Member States.¹²⁸ In order to avoid such failures, an important innovation was reached in the first half of 2004 under Irish presidency. The Council agreed to establish below the level of the 'chief negotiator', who speaks in formal negotiation settings, the so-called 'lead negotiators'. These persons would speak for the EU in the more open mode of negotiations with counterparts from other states and follow a certain topic for several years. They came from either the Presidency team, or from Member States not holding the Presidency or even the Commission (particularly on issues of exclusive or predominant EU competence).¹²⁹ This 'team EU' approach injected a much needed continuity into the EU's external environmental representation at working level and freed more time for outreach.¹³⁰

124 M Groenleer and L van Schaik, 'The EU as an Intergovernmental Actor in Foreign Policy, Case Studies of the International Criminal Court and the Kyoto Protocol' (2005) 12 <https://www.ceps.eu/content/martijn-lp-groenleer>.

125 C Damro, 'EU-UN Environmental Relations: Shared Competence and Effective Multilateralism', in KV Laatikainen and KE Smith (eds), *The European Union at the United Nations* (Palgrave 2006) 184.

126 J Gupta and L Ringus, 'The EU's Climate Leadership: Reconciling Ambition and Reality', (2001) 1 *Intl Enviro Agr* 281, 288-9.

127 S Oberthür, 'The European Union's Performance in the International Climate Change Regime' (2011) 33(6) *J Eur Integrat* 667, 669.

128 Kulovesi (n 122) 124, with further references.

129 M Buck, 'The EU's Representation in Multilateral Environmental Negotiations after Lisbon' in E Morgera (ed), *The External Environmental Policy of the European Union* (CUP 2012) 76, 78.

130 Oberthür (n 127) 672.

Despite this improvement, the system of external representation came under strain in December 2009 in Copenhagen at COP15. Here, a relatively rigid Council position from October, bridging large differences between Member States, did not allow for much flexibility for the EU. Moreover, the Swedish presidency, assisted by the incoming Spanish presidency and the Commission, was undermined by bilateral priorities of some Member States. At the final stages of the negotiation PM Reinfeld and Commission President Barroso were even openly disavowed when the leaders of France, the UK and Germany took over the lead¹³¹ to convince China and India to become more ambitious. But to no avail, as an uncommonly big alliance between the US, China and a group of emerging players, such as Brazil, South Africa and India, sidelined the EU. In the end, US President Obama and the Chinese premier Wen Jibao brought the conference to an end according to their terms; the EU was not even present in the room where the final negotiations took place, and Barroso was only informed about the final outcome by a text message.¹³² Finally, the substance – with political commitments on the reduction of greenhouse gases only – was a far cry away from the EU ambitions on binding commitments for far-reaching reduction goals. The Swedish presidency thus characterized this experience as an outright disaster for the EU – an assessment that is shared by academic analysts. Some called Copenhagen a ‘worst case scenario, in which the EU has only a low impact and was largely marginalized’¹³³ and another observer found that the complicated external representation was one of the factors for the EU’s failure in Copenhagen.¹³⁴

After the entry into force of the Lisbon Treaty, the EU travelled with a modernized set-up to COP16 in Cancun. First, in line with academic advice to become a more ‘flexible’ and ‘strategic’ foreign climate policy actor,¹³⁵ it levelled down its ambitions: the EU negotiation position, defined by the Council in October 2010, aimed at a concrete set of decisions that implement the Copenhagen Accord rather than taking

131 L. Groen, A. Niemann and S. Oberthür, ‘The EU as Global Leader? The Copenhagen and Cancun UN Climate Change Negotiations’ (2012) 8(2) JCER 173, 179.

132 J. Curtin, ‘The Copenhagen Conference: How Should the EU Respond?’ (The Institute of International and European Affairs, Dublin 2010) 6.

133 G. Eppstein, S. Gerlach and M. Huser, ‘The EU’s Impact on International Climate Change Negotiations – the Case of Copenhagen’ (Research paper 2010) 15 <http://dseu.lboro.ac.uk/members/Maastricht/DSEU%20Epstein%20Gerlach%20Huser%20paper.pdf>.

134 R. M. Fernandez Martin, ‘The European Union and International Negotiations on Climate Change: A Limited Role to Play’ (2012) 8(2) JCER 192, 199.

135 L. Van Schaik and S. Schulz, ‘Explaining EU Activism and Impact on Global Climate Politics: Is the Union a Norm- or Interest-Driven Actor?’ (2012) 50(1) J. Common Mark Stud 169, 184.

new commitments. It also replaced its strategy to lead by example and persuasion through a new type of ‘leader-cum-mediator’ (‘leadeator’) role, accepting the need for strategic coalition building.¹³⁶ Second, driven by a Belgian presidency whose foreign minister Vanackere understood that the rotating Presidency had lost its place in the Lisbon structure,¹³⁷ it upgraded the Commission in formal external representation. The Belgian presidency would still act as representative of the EU in Mexico. But it now divided up the speaking time for EU statements with the Commission. Hence the Belgian Minister Schauvliege and European Climate Commissioner Hedegaard spoke in two separate slots. Importantly, COREPER (Committee of Permanent Representatives in the EU) had also agreed shortly before the start of COP16, that both actors should speak behind the EU nameplate.¹³⁸ Moreover, during the last conference night the Minister left *de facto* the final negotiations to the Commissioner.¹³⁹ At the same time, the EU kept the system of informal division of labour, where a couple of lead officials covered different topics below the political level. Importantly, inside the Commission, expertise on climate action had at the time also been pooled together with the creation of a specific Directorate-General, put at the disposal of Mrs Hedegaard (as of February 2010).

This upgrade of the Commission as the *de facto* lead negotiator for climate action further continued in COP17 in Durban a year later (2011). While the Polish environment minister kept his formal representative role, in practice Mrs Hedegaard led the negotiations because she was considered as more knowledgeable and charismatic.¹⁴⁰ She forged a key alliance with developing countries to support climate action goals in Durban. Not surprisingly, academic literature then praised her as the real ‘hero’ for having brokered the Durban Platform¹⁴¹ – and no word was dropped about the EU Presidency’s role

136 K Bäckstrand and O Elgström, ‘The EU’s Role in Climate Change Negotiations: From Leader to “Leadiator”’ (2013) *J Eur Public Policy* 1, 2.

137 T Delreux, ‘The Rotating Presidency and the EU’s External Representation in Environmental Affairs: The Case of Climate Change and Biodiversity Negotiations’ (2012) 8(2) *J CER* 210, 215.

138 J Thomson, ‘A Member State’s Perspective on the Post-Lisbon Framework for the EU’s Representation in Multilateral Environmental Negotiations’ in E Morgera (ed), *The External Environmental Policy of the European Union* (CUP 2012) 96, 108.

139 Delreux (n 137) 221.

140 See S de Jong and S Schunz, ‘Coherence in European External Policy before and after the Lisbon Treaty: The Cases of Energy Security and Climate Change’ (2012) 17(2) *Eur Foreign Aff Rev* 165, 84.

141 Bäckstrand and Elgström (n 136) 12.

there. In the same vein, Commissioner Hedegaard also out-shadowed the Cypriot presidency in the subsequent more technical COP18 in Doha (2012).

In June 2013, the Environment Council adopted more ambitious EU objectives for climate negotiations that should lead to the conclusion of a new climate agreement by 2015.¹⁴² A week later, the Foreign Affairs Council followed suit with a paper outlining the EU's diplomatic efforts on how to convince international partners about these new objectives.¹⁴³ The Council asked that the 'High Representative and the Commission, in their respective role and competence, coordinating and working closely with Member States, deploy EU climate policy diplomacy as identified in the joint reflection paper'.¹⁴⁴ This paper is not only the beginning of a structured EU 'climate diplomacy', but also bears an interesting institutional dimension. Grasping on its CFSP competence to conduct policy dialogues with third countries, the EEAS takes its share in the conduct of the EU's external environmental policy as a new actor in the field.¹⁴⁵ At the same time, the Commission is put on equal footing with the EEAS, and the Presidency is not involved in climate diplomacy.

But this did not mean that the Presidency was completely out for external representation purposes at the following Conference of the Parties. At COP19 in Warsaw (November 2013), the bi-cephal representation of the EU with the Presidency and the Commission continued. However, after the conference, it was the European Commissioner Hedegaard alone who welcomed the (limited) progress during the conference on behalf of the EU.¹⁴⁶

The final step occurred in 2015. Throughout the year, the EEAS, the Commission and Member States engaged in bilateral climate diplomacy, based on an action plan approved by the Council. With such streamlined external messages, declarations of Germany and

142 Council Conclusions on an EU strategy on adaptation to climate change, 18 June 2013 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/137508.pdf.

143 Council Conclusions on EU climate diplomacy, 24 June 2013 http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/137587.pdf.

144 *ibid*, point 7. The Joint Reflection paper, a non paper of the EEAS and the Commission services can be found here: http://ec.europa.eu/clima/policies/international/negotiations/docs/eeas_26062013_en.pdf.

145 On the potentials of the High Representative and the EEAS to play a role in the EU's environmental policy see C Damro, 'The Post-Lisbon Institutions and EU External Environmental Policy' in E Morgera (ed) *The External Environmental Policy of the European Union* (CUP 2012) 55.

146 European Commission, 23 November 2013, EU welcomes progress on international climate action at Warsaw conference http://europa.eu/rapid/press-release_MEMO-13-1044_en.htm.

Brazil and of France and China marked important achievements.¹⁴⁷ At the Paris conference in December, the EU was then represented in the negotiations by Carole DIESCHBOURG, Minister of Environment for Luxembourg for the Presidency, and Miguel Arias Cañete, EU Commissioner for Climate Action and Energy. For the leader's meeting, Commission President Juncker represented the EU. In the second Paris week, the EU and the Marshall Islands spearheaded a 'high ambition coalition', which eventually got Brazil and the United States on board. When the conference succeeded to adopt the post-Kyoto Paris Agreement, the Union's previous outreach activities and the increased internal discipline seem to have contributed to shape the international consensus. The European Commission summarized the success factors as follows:

*Throughout the Paris Conference, the EU maintained a high level of political coherence. All EU ministers in Paris showed willingness and determination to succeed. The EU acted as one, defending the EU position as agreed by the Environment Council. This allowed the EU to speak with a single and unified voice in all phases of the negotiations, a crucial element for the successful outcome in Paris. Most importantly as part of the EU's climate diplomacy outreach, the EU and its partners built a broad coalition of developed and developing countries in favour of the highest level of ambition. This High Ambition Coalition was instrumental in creating a positive dynamic during the negotiations and getting all big emitters on board the Paris Agreement.*¹⁴⁸

Clearly, this is no small achievement on process. Moreover, on substance, the Paris Agreement speaks to the constitutional aim of the European Union to 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources' (Article 21(2)(f) TEU) as it leads a global path for decarbonization and created a new dynamic of international cooperation.

147 S Oberthür, 'Where to Go from Paris? The European Union in Climate Geopolitics' (2016) 2(2) Global Affairs 119, 122.

148 European Commission, Communication from 2 March 2016, COM (2016) 110 final. 'The Road from Paris: Assessing the Implications of the Paris Agreement' and accompanying the proposal for a Council decision on the signing, on behalf of the European Union, of the Paris agreement adopted under the United Nations Framework Convention on Climate Change, 2.

7.1.1 *The negotiations on multilateral environmental agreements*

As observed before, the climate change negotiations are mostly about soft law – and even when a particular COP exceptionally produced hard binding law (such as the Kyoto Protocol and the Paris Agreement) the EU applied the same informal arrangements to it. The situation is different, however, when an international conference is staged *ab initio* with the agreed purpose between the participants to negotiate a legally binding agreement. Inside the Union, the above-mentioned disciplines under Article 218(3)–(6) TFEU come into play, including the novelties under the Lisbon Treaty. In that regard, two important test cases arose in 2010 – namely the negotiations on mercury and on the Nagoya Protocol on the Biological Diversity Convention.

When the United Nations Environment Programme (UNEP) triggered the initiative to negotiate a new international agreement on mercury in 2009, the Commission recommended the Council to appoint it as sole EU negotiator on all issues.¹⁴⁹ However, the Council disagreed. For their lawyers, echoing the predominant view in Member States,¹⁵⁰ the EU had not yet exercised all competences on the matter. Hence, there was some room for the Member States to be represented as well. Turning to the Lisbon Treaty's innovations in Article 218 TFEU, the Council felt that the Commission and the Presidency should form a 'negotiating team', referring to a new expression used in Article 218(3) TFEU. Both would be responsible for the outcome of the negotiations and the positions would need the common agreement of the representatives of the Member States meeting in Council.¹⁵¹

For the Commission this proved unacceptable. It recalled that environmental protection is qualified as a shared competence. Even if parts of that competence had not yet been exercised, it remained an EU competence, and not a national competence.¹⁵² Moreover, the wording 'negotiating team' in Article 218(3) TFEU did not enlarge the circle of EU external representatives – under Article 17 TEU external representation is entrusted to the Commission or the HR only, and never the presidency of the Council.¹⁵³ The Commission hence withdrew its

149 European Commission, SEC (2009) 983.

150 See e.g. Thomson (n 138) 101: 'In short, whilst the changes made by the Lisbon Treaty were designed to provide the EU with a strong voice internationally, this can be done without riding roughshod over the legal powers and position of the Member States.'

151 T Corthaut and D Van Eeckhoutte, 'Legal Aspects of EU Participation in Global Environmental Governance under the UN Umbrella' in J Wouter et al (ed), *The European Union and Multilateral Governance* (2012) 145, 159.

152 In support of that proposition also Wouters and Ramopoulos (n 8) 234.

153 Buck (n 129) 90.

recommendation for negotiating directives and left the EU without any position for the first Intergovernmental Negotiating Committee at UN level in Stockholm (June 2010). Moreover, the Presidency and the Commission delivered competing opening statements, defying the right of the other to speak.¹⁵⁴ This was an embarrassing situation as external partners got a very clear idea about the internal division in the EU.¹⁵⁵

However, in the long run, the principled position of the Commission proved correct. In December 2010, a compromise was struck. The Commission became the negotiator where the Union has competence and has acted upon this. It should consult with the Special Committee appointed by the Council and the Member States throughout the negotiations¹⁵⁶ (meaning both in Brussels and on-spot). But such Committee cannot issue instructions to the Commission.¹⁵⁷ Rather, in line with the above-mentioned ECJ case,¹⁵⁸ its task remains consultative. In return, the Commission accepted that the Presidency led on a number of institutional issues (e.g. financial assistance) which could be considered of Member State competence. With this arrangement, the EU participated effectively in the 2nd meeting of the Intergovernmental Committee in Chiba, Japan (January 2011) and all subsequent meetings, leading finally to the adoption of the Minamata Convention on Mercury. The Council authorized the EU's signature in September 2013,¹⁵⁹ and an EU representative and 21 Member States actually signed the text in October 2013. Its ratification by the EU¹⁶⁰ and its Member States is currently pending.

The second – and less controversial – case referred to the Nagoya Protocol on Access and Benefit-sharing to the Convention on Biological Diversity (CBD). It was negotiated during the 10th meeting of the Conference of the CBD parties in October 2010. Here, again, the Council authorized the Commission to negotiate on behalf of the Union on most topics with formal negotiating directives under Article 218(2) TFEU. At the same time, the Commission confirmed its intention to directly

154 Corthaut and Van Eeckhoutte (n 151) 159.

155 Delreux (n 137) 214.

156 Council Decision on the participation of the Union in negotiations on a legally binding instrument on mercury further to Decision 25/5 of the Governing Council of UNEP, Doc 16632/10, 6 December 2010.

157 For that proposition see Thomson (n 138) 96, 99.

158 (n 25) paras 85–97.

159 Council Decision of 23 September 2013 on the signing, on behalf of the European Union, of the Minamata Convention on Mercury (Doc 11995/13).

160 See Commission Proposal for a Council Decision on the conclusion of the Minamata Convention of 2 February 2016, COM (2016) 42 final.

nominate experts from Member States in the Union's negotiating team and entrust them with specific tasks under his guidance. Indeed, the EU team was then made up of three Commission officials plus experts from Austria, Belgium, France, Germany, the Netherlands, Spain and the UK.¹⁶¹ This carried over the pre-Lisbon 'team EU' approach from climate negotiations, but with an important institutional difference. The involvement of Member State experts would not be a consequence of a Presidency decision as part of the 'negotiating team' under Article 218(3) TFEU, but it would be the result of a decision of the Commission as the main appointed formal negotiator. For the remaining topics deemed of national competence, the Belgian presidency led the EU delegation, assisted by Member States' representatives. In the plenary, both the Commission and the Presidency spoke from behind the EU nameplate, sitting side by side and using a joint microphone.

8. Comparison

In the field of trade policy the Lisbon changes have given an ever stronger role to the European Commission in external representation. Endowed with broader exclusive powers under Article 207 TFEU, it was able to fill the entire international stage in multi- and bilateral negotiations. And even when it came to the selection of the next WTO Director-General – arguably a political trade matter – it brought about a coordinated EU position, leaving no room for the High Representative to take over. In contrast, the external environmental policy has seen a less federalist dynamic. Based on the legal ground that this shared competence still keeps some Member State competence untouched, the Presidency has survived in subsequent conferences of the parties on climate change and in the treaty negotiations on mercury and biological diversity. Moreover, the EEAS has formally come into this policy although environmental issues have not much to do with CFSP, except when construing them as a security matter.¹⁶² This involvement was rather done under the post-Lisbon hat 'climate diplomacy', where a wide net of EU delegations in the world under the authority of the High Representative is used to foster EU goals. The determination of those objectives remained in the hands of the (Environmental) Council. However, in both instances (treaty negotiations and climate diplomacy), the Commission keeps

161 Buck (n 129) 93, note 59.

162 Damro (n 145) 62 gives the example of 'conflicts over climate change and migration, caused by water and land scarcity'.

the strings together. *De facto*, its external role has become increasingly important to represent the EU on most environmental matters, and the role of the Presidency declined accordingly.

9. Conclusion

Seven years after Lisbon, the external representation of the European Union has not become any easier. While an initial analysis of the Lisbon Treaty's text had already rightly concluded that sharing this task between the High Representative, the President of the European Council and the Commission makes it uncertain whether greater unity and coherence will be projected in the international scene,¹⁶³ practice has shown that the reality is even more complicated: Europe has the luxury to let two Presidents, one High Representative and at least three external Commissioners (trade, development, enlargement) speak at high level international events 'on behalf of the European Union'. Other Commissioners represent the Union for the external dimension of their internal policies as well. In addition, as shown with the example of the Union's environmental diplomacy, the rotating Presidency has still survived in those fields, albeit the constitutional basis for its action is doubtful. Therefore, one cannot speak about a 'unified' external representation. Rather, the current system is very much characterized by 'sectoral' external representation. This, in turn, means that the double-hatting of the High Representative had much less effect than probably expected by the drafters of the Convention and the Lisbon Treaty.

Moreover, when it comes to representing the Union in CFSP matters, the case studies of Iran and Ukraine have shown that the acceptance of the EU actors by third countries in question is another important factor. Where such acceptance is missing, EU Member States can still come in and create ad hoc formats, such as the Normandy format. Hence, the role of the Council President and the High Representative still depends very much on the political will of others.

Going one step further into internal decision-making, the situation has improved over the last years, though in the area of non-CFSP policies. With guidance from the Court of Justice, it is by now clear that the Council can exercise policy-making, whereas the Commission should not be curtailed in its role as external representative. In return, the Commission must pay due respect to the duty of sincere cooperation.

163 Kaddous (n 7) 219.

Hence, Council negotiation directives are needed to negotiate international agreements, a prior Council approval is warranted before the Commission may conclude a political MoU, and the Council should be consulted before submitting briefs before international Courts. In the area of shared competence, the Commission has also been willing to integrate Member State experts in its negotiating teams.

All in all, Europe thus continues to operate a multi-layered system of external representation, where supra-national elements with a strong role of the Commission in important areas are combined with inter-governmental traits of a principal-agent relationship between the Council and its President or the High Representative. Is this any better to understand Europe from a third country perspective? Probably not. Is this any better for the EU's efficiency as a diplomatic actor than before Lisbon? Probably yes. Is this a satisfactory conclusion of this article? Probably we should leave this judgment to the esteemed reader of this journal whom we hope not to have disappointed in the first issue thereof.¹¹² European Commission (n 76):